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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 519

THE CAMDEN FIRE INSURANCE ASSOCIATION,
A CORPORATION,
Petitioner,

vs.

JENNIE M. SUNDQUIST, ADMINISTRATRIX OF THE ESTATE OF ANTON E. SUNDQUIST, DECEASED,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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JENNIE M. SUNDQUIST, ADMINISTRATRIX OF THE ESTATE OF ANTON E. SUNDQUIST, DECEASED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

The petitioner, Camden Fire Insurance Association, a corporation, appealed to the United States Circuit Court of Appeals for the Seventh Circuit from a judgment of the District Court of the United States, for the Southern

District of Illinois, Northern Division, entered upon the verdict of a jury in the amount of $6,236.40, rendered against the petitioner in an action at law instituted by Anton E. Sundquist, the original plaintiff, upon two policies of fire insurance issued by the petitioner, in the amounts of $4,000 and $2,500, respectively, covering Sundquist's stock of merchandise and fixtures, contained in a building in Galva, Illinois (Trans. 232). The original plaintiff, Anton E. Sundquist, died while the case was pending in the trial Court, and his death having been duly suggested, the administratrix, Jennie M. Sundquist, was substituted as plaintiff. Among the defenses pleaded was that the policies were rendered void by fraud and false swearing by the insured subsequent to the loss, concerning material facts.

The policies of insurance provided:

> "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance, or the subject thereof; or if the interest of the insured be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss" (Trans. 17).

In connection with the instant application, we intend to refer only to the evidence of fraud by the insured with reference to certain forged invoices, which matter was the subject of major emphasis in the opinion of the Circuit Court of Appeals. The evidence established that subsequent to the fire the insured had several meetings with representatives of the insurance companies (Trans. 111-112). Sundquist, the insured, then stated that practically all of his stock had been purchased within the last year and a half to three years, and that all of the invoices had been on top of his desk and were destroyed by fire (Trans. 112). The representatives of the insurance companies then told Sundquist that it would be necessary for him to com-

municate with the firms from which he purchased the merchandise, and obtain duplicate invoices; Sundquist said he would obtain duplicate invoices (Trans. 112). At a later meeting with the representatives of the insurance companies, Sundquist presented two purported invoices dated respectively September 26 and October 15, 1934, of the Schiller Piano Company (Defendant's Exhibits 4 and 5, Trans. 204-205), covering three Schiller pianos (Trans. 111). The invoices were forged (Trans. 116, 118). A memorandum dated September 26, 1934 (Defendant's Exhibit 6, Trans 205), containing typewriting and pencil notations in Sundquist's own handwriting (Trans. 62) was presented to the representative of the insurance companies at the same time (Trans. 111).

The three Schiller pianos, bearing numbers 67152, 66933, and 67196, listed in the forged invoices and memorandum as having been purchased by Sundquist from the Schiller Piano Company, Oregon, Illinois, in the year 1934, were actually purchased in the year 1920, as is shown by the original entries in the daily journal of that company (Defendant's Exhibits 41B, 41C and 41D, Trans. 209, 211, 213.)

In order to understand the inexorable linking of Sundquist with the forged invoices and memorandum it is necessary photographically to reproduce them. The following are photographs of the three exhibits in question:

Principal Factory and Office
OREGON, ILLINOIS

Sept-26-1934

Defendant's Exhibit 4

1 Style #10 Oak Schiller Player #67152		$365.00
1 " #10 " " " #66933		365.00
		$730.00

TERMS: 2% - 30 days

SETTLEMENT MUST BE MADE STRICTLY IN ACCORDANCE WITH THE TERMS OF THIS INVOICE

Defts Ex 21

SCHILLER PIANO COMPANY

Principal Factory and Office
OREGON, ILLINOIS

Defendant's Exhibit 5

Oct-15-1934

1 Style Mahogony Schiller Player #67196	$365.00

TERMS: 2% - 30 days

SETTLEMENT MUST BE MADE STRICTLY IN ACCORDANCE WITH THE TERMS OF THIS INVOICE

Defts. Ex. 30

Defdt. Ex 6

Defendant's Exhibit 6

Sept-26-1934

1 Style #10 Oak Shiller Player #67152	$365.00
1 " #10 " " " #66933	365.00
1 " " Mah. 86 mk 67196	$730.00
	365.00

~~2 Style #10 Oak~~

Verse Low 2 Style N Burn Mahogany Player { 430 / 430

1 Cobb Nelson reg - 165.00

1 Bush & Gerts player - 385.00

~~1 Style #10 Mahogony Schiller Player #67196 $365.00~~

1 Hamilton — 260.

8. new

~~2 - Oak~~ 1 used piano - 125.

3 - used 1 " " 60

1 " " 60.

71

Deft ex 29

It was admitted that all of the writing in pencil on Defendant's Exhibit 6 was in Sundquist's own handwriting (Trans. 62). There appears in Sundquist's own handwriting on Defendant's Exhibit 6 the following: "1 " " Mah. 88 note 67196 ($) 365.00." The typewriting on the forged Schiller piano invoice (Defendant's Exhibit 5) reads: "1 Style Mahogony Schiller Player #67196 $365.00." The typewriting on Sundquist's memorandum was prepared prior to his writing thereon in longhand. This is conclusively shown by the fact that part of the typewriting in Defendant's Exhibit 6 has been crossed out in pencil, and by the ditto marks in the line "1 " " Mah. 88 note 67196 365.00." The words and figures in typewriting which appear on Defendant's Exhibit 6, are identical with the words and figures on the two forged Schiller Piano Company invoices. Even the same layout, the same use of dashes in the date, and the incorrect spelling of the word mahogany are common to all of these documents.

The daily journal of the Schiller Piano Company (Defendant's Exhibits 41B, 41C, and 41D) shows that the three Schiller pianos identified by their serial numbers, 67152, 66933, and 67196, in the two forged invoices and in the Sundquist memorandum, had been purchased in 1920 (Trans. 209-213). Sundquist in the forged invoices and his memorandum represented that they were purchased in the year 1934. The pianos were of the player-piano type, and the evidence established that pianos of this type, manufactured in 1920, declined very rapidly in value thereafter (Trans. 118, 149-150). There was no evidence to the contrary. As further bearing on the question of falsely dated invoices, the following letter was written by Sundquist in January of 1937:

"Jan. — 7 — 1937.

"*Cable Company,*
Wabash Ave.,
Chicago, Ill.

GENTLEMEN:

We had a fire at our store and we had a complete loss. We had one Cable Company player piano which we think was billed to us at about $260 and we also had one Hamilton Straight Piano which we think was billed at about $145.00 or possibly more. Our adjusters say we have to get duplicate bills on these as our bills were all burned up.

Wondered if you would help us out by sending us duplicate bills on these two numbers and date them a few years back—about '33 or '34.

Sincerely,
Sundquist & Son,
By A. E. Sundquist.

"P. S. We also had in stock a new Bush & Gerts player piano—do you handle them and if not do you know where we could get a duplicate billing on this Bush & Gerts player piano.

This would be a great accommodation if you could help us out on this—and please send us a circular of your small pianos as we have a customer at the present time" (Trans. 204).

In fact the last piano which Sundquist had purchased from the Cable Piano Company was bought in January of 1928 (Trans. 202-203).

No evidence was offered by plaintiff explaining or attempting to explain any of the matters above stated. In the Circuit Court of Appeals the contention was advanced that the documents were manufactured by defendant; there is no evidence in support of this contention.

The trial Court refused to direct a verdict on the issue of fraud and false swearing and this ruling was approved by the Circuit Court of Appeals. The Circuit Court of Appeals, on the authority of *Soler & Co.* v. *United Fire-*

men's Insurance Company, 299 U. S. 45, held that the issue of fraud and false swearing was one of fact for the jury.

One of the principal issues in the case upon the trial thereof was the fraud and false swearing by the insured with reference to the age and value of the property insured. The insured contended that the stock and fixtures were all relatively new and had all been acquired within a year and a half to three years prior to the fire (Trans. 112). To meet this issue, defendant introduced evidence that the stock and fixtures were much older than was claimed, that a large part of the stock was obsolete, that the fixtures were not modern, and in support of this contention defendant offered in evidence Exhibit No. 53, being an inventory of the stock and fixtures purchased by Sundquist at a bankruptcy sale in 1922, which was the starting point of his business (Trans. 215). Many of the items listed in the bankruptcy appraisal (Defendant's Exhibit 53; Trans. 215) were identical in name and description with items appearing in Sundquist's schedule of property lost submitted after the fire (Plaintiff's Exhibit 4; Trans. 181). For example, Edison phonographs are common to both. Such phonographs were not manufactured after 1930 and had no value in 1936 (Trans. 150). The trial Court held this evidence inadmissible (Trans. 142). At the time the case was tried in the District Court there was pending, but undecided, before the Appellate Court for the Second District of Illinois, an appeal in the companion case of *Sundquist* v. *Illinois Fire Insurance Company,* 305 Ill. App. 160 (Appendix, p. 1). The latter case arose out of the same fire, the policy there involved covering the same property as that insured under petitioner's policies. The case was tried in the state Court. On April 6, 1940, some four months after the conclusion of the trial in the instant case, the Appellate Court for the Second District of Illinois handed down its opinion, and held that Exhibit

53 was admissible in evidence. The Appellate Court for the Second District of Illinois reversed the judgment of the trial Court, and remanded the case for a new trial. No appeal was taken to the Supreme Court of Illinois, and the opinion of the Appellate Court remains in full force and effect as stating the Illinois law upon the issue involved.

Upon appeal to the Circuit Court of Appeals, it was contended that the Court was bound to follow the ruling of the Appellate Court as to the admissibility of the identical exhibit, but the Circuit Court of Appeals did not take the same view as the Appellate Court, stating that the 1922 inventory was not material. The Court did not discuss the binding effect of the Appellate Court decision as to the admissibility of the identical evidence. It was not until after the briefs had been filed in the Circuit Court of Appeals that the opinions of this Court were handed down in the cases of *Six Companies of California* v. *Joint Highway District,* 311 U. S. 180; *West* v. *American Telephone and Telegraph Co.,* 311 U. S. 223, and *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169, in which decisions this Court finally put at rest a question as to the binding effect of decisions of intermediate courts of appeal upon Federal tribunals. Prior to the decisions last referred to, there had been a divergence of opinion in the United States Circuit Court of Appeals as to the binding effect of decisions of Illinois Appellate Courts. See *Damen and Jarvis Building Corporation* v. *Mechanics' Insurance Company,* 83 Fed. (2) 793.

II.

Statement as to Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the United States Code, as amended (United States Code, Title 28, Section 347). The judgment of the United

States Circuit Court of Appeals for the Seventh Circuit was rendered on March 17, 1941. Petition for rehearing was denied on June 11, 1941.

III.

Questions Presented.

Two questions are raised by this petition:

1. Whether the United States Circuit Court of Appeals for the Seventh Circuit erred in refusing to reverse the judgment of the Court below, for the reason that the petitioner was entitled to a directed verdict upon the trial of the case, by reason of the fraud and false swearing perpetrated by the insured on the petitioner. The ruling of the Circuit Court of Appeals rested upon a misapprehension of the effect of the case of *Soler & Co.* v. *United Firemen's Insurance Company,* 299 U. S. 45.

2. Whether the Circuit Court of Appeals was bound to follow the decision of the Appellate Court for the Second District of Illinois in the companion case, *Sundquist* v. *Illinois Fire Insurance Company* (305 Ill. App. 160; Appendix, p. 1) as to the admissibility of an identical exhibit.

IV.

Reasons Relied on for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals was predicated upon a misunderstanding of the scope and effect of the decision of this Court in *Soler & Co.* v. *United Firemen's Insurance Co.,* 299 U. S. 45.

2. The refusal of the Circuit Court of Appeals to follow the decision of the Appellate Court for the Second District of Illinois as to the admissibility of defendant's Ex-

hibit 53, the Appellate Court for the Second District of Illinois having held the exhibit admissible in *Sundquist* v. *Illinois Fire Ins. Co.*, 305 Ill. App. 160 (Appendix, p. 1).

V.

Prayer for Writ of Certiorari.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of the record of all proceedings in the case entitled on its docket No. 7360, *Jennie M. Sundquist, Administratrix of the Estate of Anton E. Sundquist, deceased, appellee* v. *The Camden Fire Insurance Association, a corporation, appellant,* and that said judgment of the United States Circuit Court of Appeals for the Seventh Circuit be reversed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

THE CAMDEN FIRE INSURANCE ASSOCIATION, a corporation,

By Herbert V. Wittich

Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. .....

THE CAMDEN FIRE INSURANCE ASSOCIATION, A CORPORATION,

Petitioner,

vs.

JENNIE M. SUNDQUIST, ADMINISTRATRIX OF THE ESTATE OF ANTON E. SUNDQUIST, DECEASED,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Court below is reported in 119 Fed. (2d), page 955. The opinion also appears at page 258 of the transcript of record.

II.

Jurisdiction.

The jurisdiction of this Court is invoked in accordance with Section 240 of the United States Code, as amended (United States Code, Title 28, Section 347).

III.

Statement of the Case.

Our statement of the case appears in the preceding petition under heading I, which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in refusing to rule that the United States District Court erred in refusing to direct the jury to return a verdict in favor of the defendant, because under all the evidence in the case it appeared as a matter of law that the policies of insurance sued on by the plaintiff had been rendered void by reason of fraud and false swearing on the part of the plaintiff. (Specification 16; Trans. 244.)

2. The Circuit Court of Appeals erred in refusing to follow the ruling the Appellate Court for the Second District of Illinois as to the admissibility of defendant's Exhibit 53, and in affirming the ruling of the Court below, excluding said Exhibit (Specification 10, Trans. 243).

V.

ARGUMENT.

Summary of Argument.

Point A. The Circuit Court of Appeals Misunderstood and Misapplied Soler & Co. v. United Firemen's Insurance Company, 299 U. S. 45.

1. *A False and Fraudulent Statement Made for the Purpose of Procuring a Falsely Excessive Valuation of the Property Lost, Works a Forfeiture of All Claims Under the Policy.*

Kavooras v. *Insurance Company of Illinois*, 167 Ill. App. 220.

Claflin v. *Commonwealth Insurance Company*, 110 U. S. 81.

Hyland v. *Millers National Insurance Company*, 91 Fed. (2d) 735.

Columbian Insurance Company v. *Modern Laundry*, 277 Fed. 355.

2. *There Is a Point Where the Question of Fraud and False Swearing Becomes One of Law and Beyond Which the Insured Cannot Be Heard to Say That His Intent Was Innocent.*

Kavooras v. *Insurance Company of Illinois*, 167 Ill. App. 220.

Butler v. *Security Insurance Company*, 244 Ill. App. 379.

Cuetara Hermanos v. Royal Exchange Assurance, 23 Fed. (2d) 270, certiorari denied 277 U. S. 590.

Moreau v. Palatine Insurance Company, 84 N. H. 422, 151 Atl. 817.

Domagalski v. *Springfield Fire & Marine Insurance Co.*, 218 App. Div. 187, 218 N. Y. S. 164.

Werber Leather Coat Co. Inc. v. *Niagara Fire Ins. Co.*, 254 App. Div. 298, 5 N. Y. S. (2d) 1.

Cooley, Briefs on Insurance, Second Edition (1928), Volume 7, page 5864.

Point B. The Circuit Court of Appeals Was Bound to Follow the Ruling of the Illinois Appellate Court in Sundquist v. Illinois Fire Insurance Company, 305 Ill. App. 160 (Appendix, p. 1) as to the Admissibility of Defendant's Exhibit 53.

It Is Now Settled That Decisions of Intermediate Appellate Courts Are of the Same Binding Effect as Decisions of the Highest Court of the State.

West v. *American Telephone & Telegraph Co.*, 311 U. S. 223.

Six Companies of California v. *Joint Highway District*, 311 U. S. 180.

Fidelity Union Trust Co. v. *Field*, 311 U. S. 169.

Point A.

The Circuit Court of Appeals Misunderstood and Misapplied Soler & Co. v. United Firemen's Insurance Company, 299 U. S. 45.

The Circuit Court of Appeals stated in its opinion that the language in the opinion in the case of *Soler* v. *United Firemens Insurance Company*, *supra*, is particularly applicable in the case at bar. We believe that the Circuit Court of Appeals was in error in so regarding the opinion of this Court. The vital point of decision in the *Soler* case was that the verdict of the jury establishing the loss to be an amount far less than that claimed, did not establish

as a matter of law that the insured was guilty of willful overvaluation of the property insured. The question in the instant case is entirely different. The question here is whether the deliberate action of the insured in presenting forged invoices and supporting memoranda concerning the age of the merchandise insured renders the policy void as a matter of law. The instant case does not present a mere question of overvaluation, as the opinion of the Circuit Court of Appeals would indicate, but in fact is a case of deliberate and palpable fraud perpetrated upon the insurer. As is pointed out in the *Soler* case, 299 U. S. 45, at page 50, there may be circumstances under which an inaccurate proof of loss may be presented without "conscious dishonesty," but how can it be said that presenting forged invoices and memoranda and requesting falsely dated invoices from manufacturers is anything but conscious dishonesty? The intention to deceive is here manifest and the instant case is governed by the authorities holding that a fraudulent statement made for the purpose of procuring a falsely excessive valuation of the property lost works a forfeiture of all claims under the policy. *Kavooras* v. *Insurance Company of Illinois*, 167 Ill. App. 220; *Claflin* v. *Commonwealth Insurance Company*, 110 U. S. 81; *Hyland* v. *Millers National Insurance Company*, 91 F. (2d) 735; *Columbian Insurance Company* v. *Modern Laundry*, 277 F. 355. The Illinois courts have likewise held that there is a point where the question of fraud and false swearing becomes one of law and beyond which the insured cannot be heard to say that his intent was innocent. *Kavooras* v. *Insurance Company of Illinois*, 167 Ill. App. 220; *Butler* v. *Security Insurance Company*, 244 Ill. App. 379. See also *Cuetara Hermanos* v. *Royal Exchange Assurance*, 23 Fed. (2) 270; *Domagalski* v. *Springfield Fire & Marine Ins. Co.*, 218 App. Div. 187, 218 N. Y. S. 164; *Werber Leather Coat Co., Inc.* v. *Niagara Fire Ins. Co.*, 254 App. Div. 298, 5 N. Y. S. (2d) 1; *Moreau*

v. *Palatine Insurance Company*, 84 N. H. 422, 151 Atl. 817; Cooley, Briefs on Insurance, Second Edition (1928) Vol. 7, page 5864.

In *Kavooras* v. *Insurance Company of Illinois*, 167 Ill. App. 220, the Appellate Court in reversing a judgment in favor of the insured and holding him guilty of fraud and false swearing as a matter of law, said (pages 228-229, 229):

> "We think the over-insurance and the other circumstances of the case completely justify the conclusion that Kavooras, both in the making of the proofs of loss and in his testimony at the trial was guilty of wilful false swearing. * * *
>
> "Some of the authorities bearing on the subject are: *Va. Fire & Marine Ins. Co.* v. *Vaughn*, 14 S. E. 754; *Clafflin* v. *Insurance Co.*, 110 U. S. 81; *Gies* v. *Bechtner*, 12 Minn. 183."

It is to be noted that the Court cited *Claflin* v. *Commonwealth Insurance Company*, 110 U. S. 81, in support of the conclusion reached.

The recent case of *Werber Leather Coat Co., Inc.* v. *Niagara Fire Ins. Co.*, 254 App. Div. 298, 5 N. Y. S. (2d) 1, illustrates the distinction between the Soler case and the case at bar. In that case, just as in the case at bar, the insured was guilty of falsifying invoices. The jury returned a verdict in his favor. The judgment below was held erroneous as a matter of law. The Court said (p. 3, 5 N. Y. S. (2d)):

> "If there is wilful misrepresentation of a material fact, or concealment thereof, on the part of the insured in the proof of loss, examination pursuant to the policy, or otherwise, the policy is void in accordance with its terms. *Claflin* v. *Commonwealth Insurance Co.*, 110 U. S. 81, 85, 3 St. Ct. 507, 28 L. Ed. 76; *Domagalski* v. *Springfield Fire & Marine Ins. Co.*, 218 App. Div. 187, 218 N. Y. S. 164; *Kantor Silk Mills, Inc.* v. *Century Insurance Co., Ltd., of Edinburgh, Scotland*, 223 App. Div. 387, 228 N. Y. S. 822, affirmed, without opinion, 253 N. Y. 584, 171 N. E. 793."

The Circuit Court of Appeals, in effect, holds, on the authority of *Soler & Co.* v. *United Firemen's Insurance Company,* 299 U. S. 45, that no matter how palpable the evidence of fraud and false swearing, the question remains one for the jury. We do not believe that the decision warrants such a view, and respectfully submit that the rule laid down in that case should not be extended as it has been by the Circuit Court of Appeals. Where the evidence of fraud is plain and does not admit of an innocent intention, the rule should remain that the insured as a matter of law is to be charged with responsibility for his fraudulent acts.

The Circuit Court of Appeals in its opinion quoted the following from *Sundquist* v. *Hardware Mutual Fire Insurance Co.,* 296 Ill. App. 510 (affirmed 371 Ill. 360):

> "False swearing in a proof of loss in order to avoid the insurance policy must be wilful and with intent to deceive and defraud the insurer."

In the cited case, the forged invoices and memoranda were not involved, as the fact that the invoices had been forged was not discovered until after the trial of that case. That case turned on the question of over-valuation, and on that point must be regarded as parallel to the decision of this Court in *Soler* v. *United Firemen's Insurance Company,* 299 U. S. 45. However, the evidence establishing the fraudulent conduct on the part of the insured in the case at bar goes far beyond that developed in the earlier trial of the companion case. There is here no question of a possible innocent intention. There was a wilful and intentional attempt to deceive the insurers as to the age and value of the pianos in question.

The opinion of the Circuit Court of Appeals refers to plaintiff's contention that the defense manufactured the evidence wherein the age of the merchandise was misstated. No evidence is referred to in support of this

contention, and there is no such evidence. Defendant's Exhibit 6 in Sundquist's own hand, already discussed in detail, (*supra,* page 3), negatives any such contention.

We submit that the apparent misunderstanding of the decision of this Court in *Soler & Co.* v. *United Firemen's Insurance Company,* 299 U. S. 45, calls for a review of the decision in the case at bar.

Point B.

The Circuit Court of Appeals Was Bound to Follow the Ruling of the Illinois Appellate Court in Sundquist v. Illinois Fire Insurance Company, 305 Ill. App. 160 (Appendix, p. 1), as to the Admissibility of Defendant's Exhibit 53.

Prior to the decisions of this Court in the cases of *West* v. *American Telephone and Telegraph Co.,* 311 U. S. 223, *Six Companies of California* v. *Joint Highway District,* 311 U. S. 180, and *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169, it had been a much disputed question whether decisions of intermediate Appellate Courts were of the same binding effect under the rule of conformity laid down in *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64, and subsequent cases, as were decisions of the highest courts of the state. In fact there was controversy among the Judges of the Circuit Court of Appeals for the Seventh Circuit as to the binding effect of such intermediate Appellate decisions. See majority and dissenting opinions in *Damen and Jarvis Building Corporation* v. *Mechanics' Insurance Company,* 83 Fed. (2) 793. Significantly the briefs in the instant case were filed prior to the rendition of the decisions of this Court referred to. We thus have the highly anomolous situation presented of the Appellate Court for

the Second District of Illinois holding the exhibit in question admissible,* while the Circuit Court of Appeals for the Seventh Circuit holds precisely the same exhibit inadmissible. Such a situation surely can not be tolerated under the rule of conformity laid down by this Court in *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, and the subsequent decisions following that case. The desirability of conformity was further emphasized by the decisions in the three cases above referred to, holding that the decisions of intermediate Appellate Courts were to be entitled to the same degree of finality as decisions of the highest courts of the state. Obviously the purpose of the rule so laid down is to insure conformity as between state and Federal Courts, and to make certain that the Federal Courts will follow and feel themselves bound by decisions from state courts, even though the Federal Courts were to regard such decisions as erroneous and would decline to adopt the same view if the question were at large.

In view of the recent decisions of this Court finally establishing the rule of conformity, it seems hardly necessary for us to belabor the point with further argument as to the law. To sustain a ruling that an exhibit regarded as admissible in the state courts is inadmissible in the Federal Courts is a complete negation of the doctrine of conformity.

The only question remaining is whether the ruling of the Circuit Court of Appeals can be sustained on the ground assigned in the opinion. The Court took the view that the inventory was not admissible, because as the Court stated, the stock had been sold prior to the time of the fire. This is precisely the same argument which was advanced in the *Illinois Fire* case as tending to sustain the ruling of the Court below in that case. The Appellate Court rejected the argument there advanced, and held the exhibit admis-

* See Appendix, page V.

sible. Whether the Appellate Court was right or wrong in its reasoning would not seem open to review by the Circuit Court of Appeals. If conformity means anything, it means the Circuit Court of Appeals is bound to follow the view taken by the Illinois Appellate Court, whether it agrees with it or not, or whether erroneous or not. Furthermore, the view taken by the Circuit Court of Appeals is not borne out by the record. (See discussion, *supra,* page 8.) The record in this case is substantially the same as that in the *Illinois Fire* case, and therefore the Circuit Court of Appeals was required to take the same view as to the admissibility of the exhibit in question, and under the decisions of this Court the Circuit Court of Appeals was not justified in declining to follow the rule as laid down by the Appellate Court for the Second District of Illinois as to the admissibility of the identical exhibit.

Conclusion.

For the reasons hereinabove set forth we respectfully submit that this Court should grant to the petitioner its writ of certiorari, and that upon a full hearing of this cause upon the return of said writ, that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit should be reversed, with directions to reverse the judgment of the Court below, or in the alternative, with directions to remand the cause to the United States District Court, for the Southern District of Illinois, Northern Division, for a new trial.

Respectfully submitted,

HERBERT W. HIRSH,
Counsel for Petitioner.

APPENDIX.

Opinion of the Appellate Court for the Second District of Illinois in Sundquist v. Illinois Fire Insurance Company of Peoria, 305 Ill. App. 160.

This suit was instituted by Anton E. Sundquist to recover upon a fire insurance policy issued by the Illinois Fire Insurance Company in the sum of $3,000.00 and which covered plaintiff's stock of merchandise and fixtures while contained in a brick building located at No. 315 and No. 317 Market Street in Galva, Illinois. The trial resulted in a verdict and judgment for the plaintiff for $3,165.42 and defendant has appealed.

The record discloses that Sundquist conducted a retail furniture store in Galva and in addition to the policy of insurance which forms the basis of this suit, appellee had in force on December 24, 1936, the date of the fire four other policies aggregating $15,500.00, all covering his stock of merchandise and fixtures. Upon two of these policies aggregating $9,000.00 appellee brought suit and recovered a judgment for $9,259.95, which was sustained by this Court. *Sundquist* v. *Hardware Mutual Fire Ins. Co.*, 296 Ill. App. 510. Thereafter the judgment of this court was affirmed by the Supreme Court. *Sundquist* v. *The Hardware Mutual Fire Ins. Co.*, 371 Ill. 360.

The facts with reference to the origin of the fire and the financial condition of appellee sufficiently appear in these opinions of the Supreme Court and of this court and need not be repeated. Upon the trial of the instant case the defendant contended, as did the defendants in the former case, that the fire was of incendiary origin and there was evidence tending to establish that defense. In his opening argument to the jury one of appellee's attorneys referred

to the fact that one of the defenses interposed by the defendant was arson, which counsel asserted must, under the law, be proven by the defendant beyond all reasonable doubt. Counsel for appellant objected and the court overruled the objection and counsel for the plaintiff then said: "They must prove beyond all reasonable doubt, as I told you in the beginning, what they had to do." In his concluding argument to the jury, another of plaintiff's counsel in commenting upon the defense that the fire was of incendiary origin, said: "That is the way it looks to me. People are presumed to be honest and righteous unless the contrary is shown. Therefore the law places upon these men the burden, if this man has committed a crime which excuses them from meeting the provisions of this contract, then they must come here with evidence that shows him guilty of the crime of arson beyond all reasonable doubt." Counsel for defendant again objected. The court overruled the objection and counsel for plaintiff then continued: "We contend that is the law and the court sustains our contention this far in the argument at least." In this connection counsel for defendant tendered to the court the following instruction which was refused. "The Court further instructs the jury that if you believe from a preponderance or greater weight of the evidence that the plaintiff, with intent to cheat and defraud the defendant, wilfully and maliciously set fire to or caused to be set fire to or burned or caused to be burned, the property described in the policy of insurance sued on, then your verdict should be for the defendant."

This refused instruction is in the identical language of the refused instruction set forth in the opinion of the Supreme Court in *Sundquist* v. *Hardware Mutual Ins. Co., supra*, at page 363. That case overruled *Rost* v. *Noble and Co.*, 316 Ill. 357 and the cases therein cited, the court stating that the reasonable doubt rule which required proof

of the commission of a felony beyond a reasonable doubt, either as a cause of action or a defense in a civil suit would no longer be adhered to in this state and expressly held that this instruction should have been given. The court concluded, however, that the refusal to give this instruction did not require a reversal of that judgment inasmuch as the record disclosed that no instruction was given saying anything about reasonable doubt but did disclose that an instruction was given which required a finding for the defendant if it was shown by a preponderance of the evidence that the plaintiff had falsely sworn that he was ignorant of the origin of the fire. The record in that case also disclosed that a special interrogatory had been submitted to the jury which specifically found that the plaintiff did not swear falsely when he said the cause of the fire was unknown to him. It likewise appears from the record in the instant case that appellee did not request nor did the court give any written instruction requiring proof of anything beyond a reasonable doubt and the ninth given instruction in the instant case is identical with the tenth given instruction as appears on pages 365 and 366 of the opinion of the Supreme Court in the former Sundquist case. However, no special interrogatories were submitted to the jury in the instant case. The record here then differs from the record in the former case in two particulars, first the absence of a special finding to the effect that the plaintiff did not swear falsely when he said the cause of the fire was unknown to him and second the erroneous statement of the law made in counsel's argument to the jury which the trial court sanctioned. The record discloses that appellee only requested one instruction which was to the effect that if the jury found the issues for the plaintiff that interest should also be allowed. Appellant tendered twenty-two instructions, fifteen of which were given as offered, one modified and six refused. In none of them were the jury told that they should be governed by the law as found in the instruc-

tions. The statement of the applicable law enunciated by counsel for appellee in their argument was erroneous. The trial court should have sustained an objection thereto. The only conclusion the jury would have been warranted in arriving at after the court had overruled counsel's objection was that defendant must prove this particular defense not by a preponderance of the evidence but beyond a reasonable doubt. Under the holding of the Supreme Court the refusal of the tendered instruction under the facts as disclosed by this record necessitates a reversal of this judgment.

It is also insisted by counsel for appellant that the record discloses appellee to have been guilty of such fraud and false swearing after the loss as to render the policy sued on void under the provisions of the policy and it is insisted that the record is entirely different in this respect from the record in the former case. It is also insisted that the verdict of the jury on the issue of the extent of the loss is against the weight of the evidence. Inasmuch as this case must be submitted to another jury it is not necessary for us to consider these alleged grounds for reversal and we refrain from expressing our opinion as to the weight of the evidence upon these issues. Neither is it necessary for us to pass upon the alleged improper remarks made by the counsel for appellee in the presence of the jury during the progress of the trial or the refusal of the trial court to sustain appellant's challenge to the array of petit jurors.

It is also insisted that the trial court erred in permitting Theodore Sundquist, a son of appellee, to testify that in his opinion the actual cash value of the merchandise in appellee's store on May 1, 1936 was between sixteen and twenty thousand dollars. His testimony disclosed that he was working in the Galva store and assisted his father in making up the inventories of that date which were offered and admitted in evidence. His testimony further disclosed that at the time of the hearing he was employed, and had

been for a year and a half, by Sears, Roebuck and Company in Chicago in the office of the Merchandise Superintendent of that company and that his daily work had to do with watching the prices and price changes of furniture, rugs and all lines of merchandise. He testified that before going to Chicago he worked as a salesman in the Galva store for his father about three years, was familiar with the stock, had handled most of it, knew the wholesale and retail values thereof and had called off the various items of merchandise to his father at the time his father listed it in the inventories referred to. He was cross-examined at length by counsel for appellant and gave his opinion of the value of certain items inquired about and was unable to do so as to others. In our opinion his testimony was competent and the weight to be accorded it was a matter exclusively for the jury. The trial court refused to admit in evidence a certified copy of the bankruptcy proceedings and appraisers' report which disclosed the purchase of the Emery stock by Sundquist in 1922. In view of the condition of the record at the time this offer was made, we are inclined to think it was admissible. The other error complained of occurred while J. W. Sundquist, a brother of appellee, was on the witness stand. He testified that a piano frame found in the debris after the fire was a "Vose" piano. The plaintiff from his seat at counsel's table in an audible voice said: "Schiller piano." Counsel for appellant moved the Court to direct the reporter to insert in the record this occurrence which was done, the Court stating: "All right. The Court will allow that, as the court heard it himself." Nothing further appears in the record. Of course it was improper for appellee to have made this statement. The court did everything which counsel for appellant requested. All of it occurred in the presence of the jury and will not occur again.

For the reasons indicated, the judgment appealed from will be reversed and the cause remanded.

REVERSED AND REMANDED.

SEP 11 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court

of the United States

OCTOBER TERM, A. D. 1941.

No. 519

THE CAMDEN FIRE INSURANCE ASSOCIATION
A CORPORATION,
Petitioner,

VS.

JENNIE M. SUNDQUIST, ADMINISTRATRIX OF THE ESTATE OF ANTON E. SUNDQUIST, DECEASED,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

FLOID B. BRIAN,
J. E. RICHARDS,
Toulon, Illinois,
JAMES H. ANDREWS,
GREGG A. YOUNG,
HARPER ANDREWS,
Kewanee, Illinois,
HARRY C. HEYL,
Peoria, Illinois,
Counsel for Respondent.

The Stark County News, Toulon, Ill.

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

SUPPLEMENTAL STATEMENT OF FACTS.

Respondent disagrees in part with the statement of facts made by petitioner and submits the following supplemental statement of facts.

Respondent denies the assertion on page 7 of petitioner's summary statement adopted as its statement of facts, that there was no evidence in support of the contention that the claimed forged invoices designated as defendant's

Exhibits 4, 5 and 6 in this case were manufactured by defendant. The dispute in the evidence about the responsibility for these papers raised one of the issues of fact submitted to the jury on the trial.

It is shown in the evidence that a few days after the fire when the insured, Sundquist, found there was to be a dispute as to liability he employed one Elwood Kroos, an insurance adjuster of long experience, to assist him in presenting his claim. (Trans. 42.) Kroos made up an itemized and detailed proof of loss and, upon request of defendant's adjusters, supplemented it with a list of the articles of furniture and fixtures claimed to have been consumed in the fire.

While cooperating with adjusters for defendant, Kroos and Sundquist called them in to the Sundquist Toulon store shortly after the fire to go over and examine the books, invoices and papers saved from the fire and being used by Sundquist and Kroos in making up the proof of loss. It is contended by defendant that during that conference in which defendant's adjusters Peck and Keeley had complete access to all the data of the Sundquist stores consisting of hundreds of items and entries, Sundquist picked up Defendant's Exhibits 4, 5 and 6, the Schiller Piano Company invoices, and turned them over to Peck and Keeley with the statement in an ordinary conversation that they were duplicate invoices for the purchase of pianos destroyed in the fire. (Trans. 112.)

Sundquist died prior to the trial in the instant case but Kroos, his adjuster, testified that he was present during the conversation of Peck and Keeley with the insured, Sundquist, and Kroos denied that Defendant's Exhibits 4, 5 and 6 were present in the room during that conversation. He further denied that the exhibits were turned

over to Peck and Keeley by Sundquist at that time and that Sundquist ever told anyone that those exhibits were "invoices which he had obtained from the Schiller Company." (Trans. 161.)

Kroos testified that he never saw those exhibits until the second trial growing out of the Sundquist fire, although Peck and Keeley admitted that they had been in possession of the said invoices all of the time since the conference in Sundquist's store in January, 1937, a few days after the fire. (Trans. 113, 115.)

It is not contended by defendant that Peck and Keeley, or any representative of the defendant, relied upon these invoices in any respect in the further transactions for the purpose of settling the loss, and it is not contended by defendant that defendant was deceived as to the value of the pianos mentioned by virtue of the exhibits or that their action or course in availing themselves of all information with respect to the value of the pianos was in any wise restricted or diverted by receiving the said invoices.

It will be noted that the invoices, Defendant's Exhibits 4, 5 and 6, do not have the name of Sundquist shown upon them and are blank invoices which might be used for any purpose. The exhibits are unusual and irregular in form.

The exhibits concerned the value of three pianos in a $20,000 stock of goods. Defendant had equal access to the information afforded by the exhibits with the insured and availed itself of such information by calling the representatives of the Schiller Company to deny the genuineness of the exhibits. It is not claimed that Sundquist submitted the exhibits under oath or that Kroos used the in-

formation contained in them in making up the proof of loss and list of merchandise attached.

The evidence shows that Peck and Keeley had access to Sundquist's typewriter in the Sundquist store at Toulon on the day when Peck and Keeley claimed to have obtained the invoices. It was stated by John Sundquist, son of the deceased insured, that Peck and Keeley were in the store for several hours and used the Sundquist typewriter present there. Their interests in denying and preventing recovery upon the policies was equal to the interests of the insured Sundquist in seeking to recover upon the policies.

It is true that there is some long-hand writing on Defendant's Exhibit 6 which is Sundquist's hand writing but there is no evidence in the record that he did the typewriting. He could not operate a typewriter. (Trans 81.)

Petitioner also declares on Pages 8 and 9 of the summary statement that the Emery Bankruptcy Schedule, marked "Defendant's Exhibit 53" in this case, was held to be admissible in evidence in the case of *Sundquist* v. *Illinois Fire Ins. Co.*, 305 Ill. App. 160. Petitioner inserted the opinion in that case in an appendix to its petition. The Appellate Court of Illinois in that opinion mentioned the same exhibit and said, "In the view of the condition of the record at the time this offer was made, we are inclined to think it was admissible." However, the record in the Appellate Court of Illinois is not before this court and neither the trial court nor the Circuit Court of Appeals in this case could be governed by the views of the Appellate Court of Illinois on a different record. The admissibility of Defendant's Exhibit 53 depends on the record in this case.

There was no proof that the articles shown in the proof of loss were stock which Sundquist bought at the Emery bankruptcy sale. The list of the Emery bankruptcy stock in Exhibit 53 and the list of articles lost in the Sundquist fire fifteen years later contained, of course, similar names because both were furniture stocks and fixtures. Counsel for plaintiff objected to the admission of the Emery bankruptcy list when it was offered and stated (Trans. 137):

> "That of course is aimed at the question of value. Even if the question of value as remote as fifteen years prior to this fire was of any significance, still this statement is wholly immaterial. We are not litigating over the question of what Sundquist paid for this bankrupt stock. That is too remote. Then it is in proof here and without any contradiction that there was no saleable article in this stock of goods in 1936 that came out of the Emery stock. * * * Somebody said there were two or three old articles out of the Emery stock, and there is no statement of their value."

This objection was sustained on the trial and the Circuit Court of Appeals found no error upon a review of the record. The Circuit Court of Appeals in its opinion said (119 Fed. 2d 955, 958):

> "Error is also assigned because the court refused to receive proffered evidence of plaintiff's purchase of a stock of goods in 1922 at a price lower than assured stated it to be. This stock furnished no part of plaintiff's loss as all of said goods had long before been sold. On this theory, the ruling was correct. The court was not 'trying' a transaction in no way connected with the loss in question."

ARGUMENT.

Summary of Argument.

A. The reasons given for the allowance of the writ are insufficient.

1. The alleged misunderstanding and mis-application by the Circuit Court of Appeals of the case of *Soler* & *Co.* v. *United Firemen's Ins. Co.*, 299 U. S. 45, does not warrant a review of this case.

   Supreme Court Rule 38, para. 5 (b) *Deputy* v. *Dupont*, 308 U. S. 488, 500, 60 Sup. Ct. Rep. 363, 369, (dissenting opinion of Mr. Justice Roberts).

2. The Circuit Court of Appeals was not obliged to follow the decision of the Illinois Appellate Court with reference to the admissibility of Defendant's Exhibit 53 in this case, and no important question of local law is involved.

   a. The statement in the opinion in *Sundquist* v. *Illinois Fire Ins. Co.*, 305 Ill. App. 160 (Appendix to Petition for certiorari, page v) that the Emery bankruptcy stock lists were admissible was based on the condition of the record in that case and could not control the admissibility of the same exhibit in this case upon a different record.

   b. The admissibility of Defendant's Exhibit 53 is not an important question of local law.

B. The evidence on the charge of fraud and false swearing was in conflict and the trial court rightly submitted the case to the jury.

1. The Circuit Court of Appeals in its opinion re-

viewed the evidence and declared a dispute existed over the responsibility for the claimed fraudulent papers. *Sundquist* v. *Camden Fire Ins. Assn.*, 119 Fed. 2d 955, 958.

2. There was conflicting evidence on the trial with reference to the alleged fraud.

   a. There was evidence that Defendant's Exhibits 4, 5 and 6 were not presented by Sundquist to defendant.

   b. There was slight evidence that Sundquist prepared the papers and some evidence that defendant's adjusters could have prepared them.

   c. The evidence showed that these exhibits were not produced until after Sundquist obtained a verdict on the first trial growing out of the fire in this case.

   d. The evidence showed a vigorous investigation by defendant, making it improbable that defendant would be misled or defrauded by any papers obtained from Sundquist.

   e. The claimed evidence of fraud concerned only three pianos in a loss of more than $20,000.00.

3. The dispute in the evidence about the claimed fraudulent accounts required the submission of the issue to the jury.

   Soler & Co. v. *United Firemen's Ins. Co.*, 299 U. S. 45.

   Fairmount Glass Works v. *Cub Fork Coal Co.*, 287 U. S. 474.

   Sundquist v. *Hardware Mutual Fire Ins. Co.*, 296 Ill. App. 510, 523.

4. Defendant's cases distinguished.

Point A. The Reasons Given For the Allowance of the Writ Are Insufficient.

1. Petitioner states two reasons for the exercise of the discretion of this court in the allowance of the writ of certiorari (Page 10 of petition). First, it is contended that the decision of the Circuit Court of Appeals should be reviewed because it was predicated upon a misunderstanding of the scope and effect of the decision in *Soler & Co.* v. *United Firemen's Insurance Co.*, 299 U. S. 45. Petitioner does not indicate how this reason could be within Paragraph 5 (b) of Rule 38 of this court which classifies the kinds of cases in which this court will grant certiorari to a Circuit Court of Appeals.

The alleged misunderstanding and misapplication of the decision in *Soler & Co.* v. *United Firemen's Insurance Co.*, 299 U. S. 45, does not warrant a review of this case here. Even if it be conceded that evidence of fraud may be so positive as to require a directed verdict against the insured, which is denied by plaintiff, the question involves only an examination of the evidence in this case to determine whether or not the issue of fraud and false swearing should have been taken from the jury.

While defendant states that it contends that the *Soler & Co.* decision was misunderstood, its argument indicates that it also contends that the Circuit Court of Appeals has overlooked or misconstrued the evidence of fraud in the record. This court should not attempt to examine all of the evidence in this case after the Circuit Court of Appeals has thoroughly performed that duty. The Circuit Court of Appeals in its opinion (119 Fed. 2d 955) reviewed the evidence in detail in respect to the evidence of loss and damage and the evidence of fraud and false swearing and gave especial attention to the views of defendant

in regard to Defendant's Exhibits 4, 5 and 6, the claimed forged invoices, and the letter from the insured appearing on page 7 of the petition in this court. In the opinion of the Circuit Court of Appeals in this case it is stated (p. 958):

> "Without discussing the evidence in detail, we conclude that the court rightly submitted the case to the jury. *Soler & Co.* v. *United Firemen's Ins. Co.*, 299 U. S. 45, 57 S. Ct. 54, 81 L. Ed. 30. The extent to which courts go in determining the presence of a jury question is shown by the opinion in *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 53 S. Ct. 252, 77 L. Ed. 439. While we need not follow the *Cub Fork Coal Co.* opinion the entire distance (see opinion in the Court of Appeals, 7 Cir., 59 F. 2d 539), in order to affirm the judgment in this case, we believe the language of the court in *Soler & Co.* v. *United Firemen's Ins. Co.*, supra, is particularly applicable to this case, (see 299 U. S. at pages 49, 50, 57 S. Ct. 54, 81 L. Ed. 30)."

There is no dispute in this case about the principles of law announced in the opinions in the cases of *Soler & Co.* v. *Ins. Co.*, 299 U. S. 45, and *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, cited in the opinion of the Circuit Court of Appeals. They are merely examples of the application of the well established rule that a dispute of fact is for the jury and not for the court. Defendant disagrees with the Circuit Court of Appeals on the evidence in this case, and declares on page 19 of its brief in support of its petition here that the Circuit Court of Appeals has held in this case that "no matter how palpable the evidence of fraud and false swearing, the question remains one for the jury." It is said that the Circuit Court of Appeals cited the *Soler & Co.* case in support of such a proposition. This view of the opinion

of the Circuit Court of Appeals in this case is not supported by anything stated in the opinion and is squarely contradicted by the language of the opinion of the Circuit Court of Appeals just quoted. The Circuit Court of Appeals reviewed all the evidence in this case and found a substantial dispute on the facts concerning fraud and false swearing. Neither the trial court nor the Circuit Court of Appeals had a right to consider the evidence of fraud and false swearing to be "palpable" or undisputed.

Defendant has no right to ask this court to review such a question in view of the limitations set forth in paragraph 5 (b) of Rule 38 of this Court and the announced practice of this court on petitions for certiorari.

> "The function of this court is to resolve conflicts of decision and to settle important principles of law. The discretionary power of this court to review judgments of lower federal courts was not intended to be exercised in every case where those courts have adjudicated the conflicting claims of the parties, which involves no important principle of law and no conflict of decision amongst the federal courts. Our rules adopted to carry out the policy of the statutes granting the power to bring cases here by certiorari have apprised the Bar and the public that we will not take cases fully heard and adjudicated below for the mere purpose of re-examining the correctness of the result. See Rule 38, par. 5, 28 U. S. C. A. following section 354." (*Deputy* v. *Dupont*, 308 U. S. 488, 500, dissenting opinion.)

2. The second reason on which defendant relies in petitioning this court for certiorari (Petition p. 10) is the refusal of the Circuit Court of Appeals to follow the decision of the Appellate Court of Illinois as to the admissibility of Defendant's Exhibit 53, the Emery bank-

ruptcy schedule. Defendant assumes that the statement in the opinion of the Appellate Court of Illinois concerning this exhibit and with reference to its admissibility in another case establishes the law of Illinois controlling the admissibility of the same exhibit in this case. No authority is cited for this unusual assumption. The trial court in this case was required to pass upon the admissibility of Defendant's Exhibit 53 on the basis of the other evidence in this case. The admissibility of the same exhibit in a suit on a different policy against a different defendant in which different evidence was produced is irrelevant. This court cannot examine the record involved in the case of *Sundquist* v. *Illinois Fire Ins. Co. of Peoria,* 305 Ill. App. 160, where it is claimed this evidence was held admissible. No principle of law is involved. The only question decided in that case as stated by the opinion was the admissibility of the exhibit in view of the record. It cannot be contended that the casual comment of the Appellate Court of Illinois in the case referred to concerns an important question of local law with which the opinion of the Circuit Court of Appeals in this case is inconsistent.

It is, therefore, respectfully submitted that the only two reasons given in the petition for the exercise of the discretion of this court in granting certiorari are insufficient and that petitoner has entirely failed to show any justification for the requested review of the evidence in this case.

Point B. The Evidence on the Charge of Fraud and False Swearing Was In Conflict and the Trial Court Rightly Submitted the Case to the Jury.

1. The principal reason advanced by petitioner for the review of this case rests on the premise that the evidence of fraud and false swearing was undisputed. This

contention is unfounded and contradicts the declaration of the Circuit Court of Appeals in its opinion (119 Fed. 2d. 955, 958). The evidence concerning the origin and significance of Defendant's Exhibits 4, 5 and 6, the claimed forged invoices, and the other papers claimed to show fraud was voluminous, and inconsistent in many respects. The Circuit Court of Appeals in its opinion expressly stated that there was a dispute in the evidence about the responsibility for the claimed fraudulent papers.

2. One of the inconsistencies in the evidence was based on the testimony by defendant's adjusters that Sundquist handed the papers marked "Defendant's Exhibits 4, 5 and 6" to them in a conference in Sundquist's Toulon store shortly after the fire. As pointed out in the supplemental statement of facts, Sundquist, the insured, died before the trial in this case, but the witness, Kroos, his adjuster, testified that he was present during the same conversation and denied that the exhibits were present in the room or were turned over to Peck and Keeley, defendant's adjusters, at that time and denied that Sundquist said that those exhibits were invoices which he had obtained from the Schiller Co. (Trans. 161.)

While defendant produced evidence that the exhibits in question were prepared on Sundquist's typewriter in his Toulon store and that one of the exhibits bore some pencil notations by Sundquist, it was also undisputed that Sundquist could not operate a typewriter (Trans. 81). There was no contention that Sundquist ever made any statement under oath concerning these exhibits and it was apparent that no reliance was ever placed upon them by defendant or its adjusters. There was a complete absence of direct evidence as to who prepared these exhibits, although the witness Kroos, who had charge of preparing the proofs of loss for Sundquist and was familiar with

all of the information used in making up the proofs of loss and itemized lists, testified that he never saw the exhibits in question until the second of the three trials on the Sundquist insurance policies which took place some years after the fire. (Trans. 161.) These exhibits were produced and offered in evidence upon the second trial, and upon the trial in this case, by the defendant. Defendant's adjusters Peck and Keeley, admitted that they had been in possession of these invoices all of the time since the conference in Sundquist's store in January, 1937, a few days after the fire (Trans. 113, 115).

All through the evidence it was apparent that reliance by defendant or its adjusters on any of the papers, proofs or figures submitted by Sundquist in an effort to obtain payment of his insurance was most improbable. This tended to refute the contention that Sundquist's conduct was intended to mislead or defraud defendant. Defendant's evidence showed that from the first it engaged the services of expert adjusters and detectives who, with the assistance of the State Fire Marshal and others, made a complete investigation.

Sundquist knew the investigation was being made and must have known that he could not deceive defendant in any way. Defendant does not claim it was ever deceived by Sundquist. The pecuniary interest of Sundquist in obtaining his insurance was no greater than the pecuniary interest of defendant and the other insurance companies collaborating in the defense. The alleged fraud in connection with Defendant's Exhibits 4, 5 and 6 concerned only three pianos in a stock of goods claimed to be worth over $20,000.00.

Counsel point to the letter, on page 7 of the petition written to the Cable Company of Chicago by the insured

with reference to a Cable piano and a Hamilton piano, as evidence of an inclination on the part of the insured to defraud the defendant. The letter was not directed to the defendant. It was an attempt to get invoices with respect to pianos consumed in the fire, but as we view it, not necessarily containing evidence of culpability.

Sundquist stated that he was required to get invoices and asked the Cable Company to help him out. Wherein is this letter evidence of fraud of the insured on this record? Defendant was not misled. The letter was not addressed to defendant and was obtained by them by means of the industry and genius displayed in obtaining every scrap of evidence available on the issue of the claimed forfeiture of the insurance contract sued on in this case.

3. All of these conflicting circumstances were for the consideration of a jury. The burden was on defendant to prove fraud and it failed to sustain that burden. The jury was well and thoroughly instructed by the trial judge on all of these issues (Trans. 168). No objection is made to these instructions. It is well settled that plaintiff has the advantage of all favorable inferences on this question and, in view of the verdict of the jury, the approval of the trial judge and of the Circuit Court of Appeals, it cannot be said no reasonable mind could find for the plaintiff on the issue of fraud. Even if this court should decide to review the decision of the Circuit Court of Appeals the only questions submitted in the petition are questions of fact which have been passed upon by the jury, the trial court and the Circuit Court of Appeals, favorably to plaintiff in every instance. *Soler & Co.* v. *United Firemen's Ins. Co.*, 299 U. S. 45, *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, *Sundquist* v. *Hardware Mutual Fire Ins. Co.*, 296 Ill. App. 510, 523.

Cases Cited by Defendant Distinguished.

4. Plaintiff contends that the cases cited by defendant under Point A of the argument (Petition p. 15) are entirely distinguishable on the facts from this case. Many of these cases were discussed in the briefs in the Appellate Court of Illinois in the first suit tried by the insured growing out of this fire and the opinion appears in *Sundquist* v. *The Hardware Mutual Fire Ins. Co.*, 296 Ill. App. 510. With reference to the cases of *Kavooras* v. *Ins. Co. of Illinois*, 167 Ill. App. 220, and *Butler* v. *Security Ins. Co.*, 244 Ill. App. 379 and several other cases from other jurisdictions the court said (p. 521):

> "The facts in these cases relied upon by appellants are clearly distinguishable from the facts as found in this record."

In the case of *Claflin* v. *Commonwealth Ins. Co.*, 110 U. S. 81, cited by defendant, the insured admitted that he intentionally made false statements under oath on material matters affecting his insurance claim. In the case of *Moreau* v. *Palatine Ins. Co.*, 84 N. H. 422, 151 Atl. 817, also cited by defendant, the false statements of the insured made under oath in a deposition and on the trial were so clearly fraudulent and dishonest that the court was required to enforce the forfeiture provisions of the policy. On the other hand, the charges of fraud in this case against Sundquist are by no means admitted or undisputed. Defendant does not rely on false statements made under oath but claims only that Exhibits 4, 5 and 6, unsigned and unsworn papers of doubtful origin, were presented to defendant after the fire. Almost every fact on which this charge is based is in dispute in the evidence, as was recognized in the opinion of the Circuit Court of Appeals. The cases cited by defendant under Point A are, therefore, not in point because the facts are substantially different.

CONCLUSION.

Respondent, therefore, respectfully objects to the granting of the writ of certiorari. Petitioner has failed to present any reason for the exercise of the discretion of this court in granting the writ and the only questions presented for review by the petitioner were questions of fact for the jury.

Respectfully submitted,

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